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No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,
Petitioner,
v.
SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT SCREEN ACTORS GUILD

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BRIEF FOR RESPONDENT SCREEN ACTORS GUILD

STATEMENT OF THE CASE

A. The Screen Actors Guild ("SAG") is a labor organization that represents performers in the motion picture and television industry. There are hundreds of employers in the industry, and performers normally work for numerous employers on a freelance basis during any given period of time. Jt. App. 48.

In July 1994, Lakeside Productions, Inc. signed the SAG 1992 Memorandum of Agreement for Independent Motion Picture and Television Producers, binding it to the SAG Codified Basic Agreement of 1989 for Independent Producers, and the SAG Television Agreement of 1989 for Independent Producers. Jt. App. 38-40, 48.

The SAG Codified Basic Agreement contained a standard-form union security clause stating that every covered performer "shall be a member of the Union in good standing" and adding that this "condition of employment"

> shall not apply until on or after the thirtieth day following the beginning of such employment or the effective date of this Agreement whichever is the later; the Union and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry. [Jt. App. 28-29.]

In implementing this union security clause, SAG requires only that covered performers pay the equivalent of uniform union initiation fees, and dues required by law. Jt. App. 49. SAG has neither interpreted nor applied the "membership" provision to require that performers become "full" members of the Union in order to be employed under a collective bargaining agreement. Jt. App. 49, 51. And

SAG notifies "financial core" employees of their right to pay solely the amount of dues and fees that is utilized for purposes related to collective bargaining. Jt. App. 51-52.

The present dispute arose after Naomi Marquez successfully auditioned for a minor role, entailing one day's work, in an episode of the television series "Medicine Ball," which was produced by Lakeside. Pet. App. 2a.

Ms. Marquez had previously performed for more than 30 days on a project for which a SAG collective bargaining agreement, governing her terms and conditions of employment, was in place. Pet. App. 2a. Consequently, under the SAG union security clause, Ms. Marquez was required as a condition of employment to pay initiation fees and dues to the Union. Pet. App. 2a.

SAG's representative testified that "it is well-known in the industry that a performer does not have to be a member of SAG to work on a project governed by a SAG contract." Jt. App. 49. Ms. Marquez's booking agents, Ingrid Fuhriman and Scott Thompson, testified that they were well aware of this fact. Ms. Fuhriman testified:

> Q: So do you advise people you represent that they should not become members of the Screen Actors Guild?
>
> A: I generally think that that is something that the person has to decide for themselves. I usually give them their options, explain to them the advantages. . . . If they're staying in Seattle, I usually say let me explain to you or give you some information about going financial core because it will provide you more opportunities here.
>
> Q: When you say financial core, what do you mean?
>
> A: Financial core is a term I'm quite familiar with. A financial core member is required to pay only for the collective bargaining agreement with the union

> and is not required to pay for any of the political agenda or any other items. And that was the reason that this was set up. However, the fallout from it is you can do both union and nonunion work. [Jt. App. 33.]

And, Mr. Thompson testified to the same effect. Jt. App. 37.

After she was notified that she received the part in "Medicine Ball," Ms. Marquez told her agents that she would be unable to take the part because she did not have the funds to cover SAG's fees. Pet. App. 3a. Over the next ten days, the interested parties engaged in a series of discussions regarding a possible arrangement whereby Ms. Marquez would pay union fees after performing on the project. *Id.* at 3a-4a. In the end, SAG advised Lakeside that the Union had no objection to the employment of Ms. Marquez in "Medicine Ball." *Id.* at 4a. However, Lakeside responded that the company had already filled the part with another performer. *Id.*

B. In December of 1994, Ms. Marquez filed a complaint in United States District Court for the Western District of Washington against SAG and Lakeside. Jt. App. 7. Ms. Marquez's lawsuit alleges two causes of action, the first against SAG for breach of the duty of fair representation, and the second against SAG and Lakeside for breach of the collective bargaining agreement. Ruling on cross-motions for summary judgment, the district court (Rothstein, J.) dismissed Ms. Marquez's complaint in its entirety. Pet. App. 4a.

On appeal, the Ninth Circuit affirmed the dismissal of Ms. Marquez's challenges to the facial legality of the SAG union security provision and the dismissal of her breach of contract claims. Pet. App. 6a-13a & 19a-21a. At the same time, the court of appeals reversed the district court's summary judgment dismissing Ms. Marquez's claim that SAG had breached its duty of fair representation by failing to inform Ms. Marquez of her range of options under

the union security agreement. In this regard, the court of appeals found that there were material disputes of fact over what SAG representatives said to Ms. Marquez, to her agents and to Lakeside's agents and that the district court had failed to consider Ms. Marquez's claim that SAG had acted arbitrarily in its *enforcement* of the agreement. *Id.* 13a-19a. The court of appeals then remanded the case to the district court for resolution of these matters. *Id.* 19a.

SUMMARY OF ARGUMENT

I. Ms. Marquez's first claim is that the duty of fair representation requires unions to negotiate union security agreements that clearly and fully set out the entire panoply of the union security rules derived from § 8(a)(3) of the National Labor Relations Act and precludes unions from negotiating the standard-form "membership" union security clauses, incorporating these rules by reference, that are included the overwhelming majority of collective bargaining agreements. Ms. Marquez argues that the use of "membership" as a "term of art" in this way is insufficiently informative, and indeed misleading, because, under § 8(a)(3), membership in the colloquial sense cannot be required as a condition of employment.

1. An integral part of the carefully balanced legislative "solution" to the union security issue enacted into law by the 1947 Congress is the express, unequivocal permission —provided in the interest of promoting industrial stability and of facilitating the collective bargaining process—for employers and unions to "enter into agreements requiring all the employees in a given bargaining unit to become members." S. Rep. No. 105, 86th Cong., 1st Sess., 7 (1947). That permission was vouchsafed as part of an overall legislative scheme that places limits on what the parties to such "membership" union security agreements can require, *in enforcing the agreements*, of covered employees in the way of membership obligations, and does so

in a manner that does not require the parties to spell out those limits in their collective bargaining agreement.

The proposition that a union violates its fair representation duty—derived from the NLRA—by negotiating an agreement within the express permission Congress wrote into the NLRA and tracking the statutory language in which Congress wrote that permission, flies in the face of the statute. Pp. 8-27 *infra*.

2. Ms. Marquez's duty of fair representation theory not only runs directly counter to Congress' express permission in NLRA § (a)(3) to negotiate "membership" union security agreements, it fails also because it has no base in the general theory of the duty of fair representation.

Under the duty of fair representation defined by this Court's decisions, "the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991) quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

In this regard, NLRA § 8(a)(3)'s first proviso, at the very least, contemplates the negotiation of "membership" union security agreements. And, the term "membership" in § 8(a)(3) was understood by Congress, and has been understood by the NLRB and the courts, as a labor law "term of art" whose meaning incorporates the statutory limitations on required membership as a condition of employment. The office of a standard-form "membership" union security agreement, like that of contract clauses generally, is to establish an enforceable contract consistent with public law. By reason of their predominance, their acceptance over time, their relative simplicity, and the settled understanding of their meaning, the standard-form "membership" union security provision provides an effec-

tive medium for expressing the parties' agreement to the most complete union security system consistent with law.

It is self-evident that this "final product of the bargaining process" *cannot* "be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78. Pp. 27-34 *infra*.

3. Ms. Marquez's suggestion that recognizing the validity of standard-form "membership" union security agreements frees unions to misuse the provision to suggest to employees that they must be full union members does not do justice to the governing law. The Act prevents just the level of misuse hypothesized by Ms. Marquez. Unions—in taking any initiative to sign up members, in responding to any employee initiative or inquiry, and in taking any action to enforce a union security agreement—must accurately explain to the employee the meaning of the "membership" requirement. And unions failing to meet that obligation commit an unfair labor practice. Pp. 34-40 *infra*.

II. Ms. Marquez's second claim is that SAG breached its duty of fair representation by negotiating an elaboration on the contractual 30-day grace period provision that she contends is contrary to the grace period requirement in NLRA § 8(a)(3), as interpreted by the National Labor Relations Board. The lower courts correctly held that this claim alleges an unfair labor practice within the exclusive jurisdiction of the NLRB. While the federal courts do have jurisdiction over fair representation claims, plaintiffs may not circumvent the primary jurisdiction of the NLRB simply by casting statutory unfair labor practice claims as violations of the union's duty of fair representation. Insofar as Ms. Marquez now attempts to escape the court of appeals' preemption ruling by advancing a new claim that the 30-day provision is misleading, that claim both comes too late in the day and is, in any event, without substance. Pp. 40-50.

ARGUMENT

I. THE SCREEN ACTORS GUILD DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION BY NEGOTIATING A "MEMBERSHIP" UNION SECURITY AGREEMENT.

The first of the questions presented by Ms. Marquez to this Court is whether the Screen Actors Guild

> breached its duty of fair representation when it negotiate[d] and maintain[ed] a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be 'a member of the Union' and pay the periodic dues and initiation fee 'uniformly required as a condition of acquiring membership,' even though those requirements cannot lawfully be enforced literally as a condition of employment? [Pet. i.]

That question is framed by two bodies of labor law, each of some complexity—first, the law defining a union's duty of fair representation; and second, the law giving meaning to the term "membership" in the provisos to § 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3), and in union security agreements negotiated by employers and unions pursuant to that statutory provision.

To put the question presented in its legal context, we therefore begin by outlining both the union security agreement at issue and the basic legal rules that form the background for this case. Next, we analyze the claim here in some detail to show how those rules apply in this particular instance.

After those preliminaries and with their lessons in mind, we demonstrate that the negotiation of standard-form "membership" union security clauses is expressly permitted by the NLRA, and that the duty of fair representation, derived from the NLRA itself, cannot be pressed into service to make a "wrong" out of what the Act makes a "right." Rather, as the court of appeals recognized, what the Act provides in the way of a counterbalance to the

permission to negotiate "membership" union security agreements is a set of limits on their administration and enforcement including, of most pertinence to Ms. Marquez's claim, the requirement that unions "inform workers" of their "option[s]" for meeting the required conditions of employment. Pet. App. 16a.

A. The SAG Union Security Clause and Its Statutory Derivation.

Since Ms. Marquez's attack is on the bare words of the SAG union security clause standing alone, it facilitates the analysis of that claim to set out those words and their derivation.

Subsection 2 A of the Codified Basic Agreement states as follows:

> Every performer hereafter employed by any Producer, whether by contract or otherwise, or who acts before the camera, or who makes sound track within the Union's jurisdiction, for any Producer, shall be a member of the Union in good standing. [Jt. App. 28.]

Subsection 2 B of the Agreement, in turn, states the following limitation on a producer's obligation to employ only SAG "members":

> The Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, if the Producer has reasonable grounds for believing that membership in the Union was not available to such performer on the same terms and conditions generally applicable to other members, or if the Producer has reasonable grounds for believing that membership in the Union was denied to such performer or such performer's membership in the Union was terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union. . . . [Jt. App. 29.]

The terms of these two provisions of the Codified Basic Agreement are taken almost word-for-word from the two provisos to NLRA § 8(a)(3), the first of which is addressed to the *negotiation* of union security agreements and the second of which is addressed to the *enforcement* of such agreements once negotiated.

The first proviso to § 8(a)(3) expressly states in the most unequivocal terms a permission to *negotiate* "membership" union security agreements:

> Nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . . [29 U.S.C. § 158(a)(3).]

The locution in Subsection 2 A of the Codified Basic Agreement—"every [employed] performer . . . shall be a member of the Union in good standing." Jt. App. 28—simply puts the statutory permission, which is stated in the passive—*viz.*, as a permission to labor organizations and employers to "mak[e] an agreement . . . to require . . . membership [in the labor organization]"—into the active form normally used to state a contractual requirement. And, while the agreement here is phrased in terms of membership "*in good standing*," Jt. App. 28 (emphasis added), whereas the statute is phrased in terms of "membership," the terms "membership" and "membership in good standing" have long been understood as synonymous in the union security context. *See Firestone Tire & Rubber Co.*, 93 NLRB 981, 983 (1951); *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880, 885 (1958).[1]

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[1] It bears emphasis that in this Court, as in the lower courts, Ms. Marquez's claim is that standard-form "membership" union security agreements—both those phrased in terms of "membership" *and* those phrased in terms of "membership in good standing"—form a single legal class and that a union's negotiation of any such agreement constitutes a violation of the duty of fair representation. This is most conspicuous in the First Question Presented which challenges the portion of the SAG union security clause here re-

NLRA 8(a)(3) goes on, in its second proviso, to state certain limitations on the *enforcement* of the union security agreements authorized by the first proviso by stating:

> no employee shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. [29 U.S.C. § 158(a)(3).]

Subsection 2 B of the Codified Basic Agreement is virtually a verbatim recitation of this statutory provision. Jt. App. 29.

In sum, what SAG has done here is to negotiate a union security agreement that denotes the pertinent obligations in the terms expressly authorized by Congress and that includes, for extra measure, a verbatim recitation of the statutory restrictions on the agreement's enforcement.

B. The Basic Duty of Fair Representation Principles.

"[B]ecause the national labor policy vested unions with power to order the relations of employees with their employer . . . this Court found it necessary to fashion the duty of fair representation." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967). That duty "is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a 'wide range

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quiring covered employees to be "a member of the Union" and does not even refer to the clause's "in good standing" language. Pet. i In responding to the First Question Presented we therefore follow Petitioner's lead and treat with the legal status of standard-form "membership" union security agreements and do so without distinguishing between those that add the "in good standing" phrase from the NLRB's "model clause" set out in the *Keystone* case and those that do not.

of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.'" *Steelworkers v. Rawson*, 495 U.S. 362, 374 (1990), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

In concrete terms, then, "[a] breach of the statutory duty of fair representation occurs *only* when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (emphasis added). And, a union's actions are "arbitrary," within the meaning of this standard, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as to be irrational." *Air Line Pilots v. O'Neil*, 499 U.S. 65, 67 (1991). The type of discrimination "prohibited by the duty of fair representation" is, moreover, "invidious 'discrimination.'" *Id.* at 81.

Thus, Ms. Marquez, as any duty of fair representation plaintiff (must establish that SAG's conduct—negotiating a "membership" union security clause that tracks NLRA § 8(a)(3)'s language—is irrational, invidiously discriminatory, or in bad faith.

C. The Basic Union Security Agreement Principles.

Turning to NLRA § 8(a)(3) and the law of union security agreements, the one certain point is that "agreements requiring 'membership' in a labor union . . . are expressly permitted by the [first] proviso" to NLRA § 8(a)(3). *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963). That being so, standard-form "membership" union security agreements are by far the most common form of union security agreement. U.S. Dept. of Labor, "Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions," Bulletin 1425-21 (May 1982) pp. 5-6 & text table 1. *See also* Bureau of National Affairs, *Collective Bargaining: Contract Negotiations and Agreements* vol. 2, pp. 140:2801-02 (1998).

Indeed, a 1995 survey by the Bureau of National Affairs of some 4,000 collective bargaining agreements in its data base—including more than 700 agreements that contained no union security clause because of a state law barring such provisions, *see* NLRA § 14(b)—found that 78% of the agreements had union security clauses phrased in terms of "membership." Bureau of National Affairs, *Collective Bargaining: Contract Negotiations and Agreements* vol. 1, pp. 24:301-302 (1996).[2]

As the structure of § 8(a)(3)—a basic prohibition accompanied by two intertwined provisos—would suggest, the 1947 Congress, in crafting that provision, sought to harmonize a number of competing labor policy objectives. Very briefly stated, the union security provisos to § 8(a)(3) embody Congress' determination, first, to prohibit the "closed shop" while expressly permitting the "union shop," and, second, to limit what unions can require of employees covered by "union shop" agreements by way of "membership" as a condition of employment.

In the last regard, the National Labor Relations Board and this Court, in the process of interpreting NLRA § 8(a)(3) and its provisos, have ruled that, while an employee's action in joining a union and assuming the status of full member (with all of the accompanying membership rights and obligations) most assuredly satisfies the require-

[2] "Union-shop" clauses were in 64% of the agreements, "modified union shop" clauses were in 10% of the agreements and "maintenance of membership" clauses were in 4% of the agreements. *Id.* at 24:301-302. These three types of union security clause all speak in terms of requiring "membership" as a condition of employment.

In addition to these three types of "membership" union security clauses, 4% of the agreements contained "agency shop" clauses, which do not speak in terms of requiring membership but rather of requiring covered employees to pay an amount equal to union dues and initiation fees. *Id.* at 24:301.

Sixteen percent of the agreements covered bargaining units that were located wholly within states that have outlawed union security clauses. *Id.* at 24:302-303.

ment stated in a standard-form "membership" union security agreement, so does an employee's action in tendering to the union an amount equal to the union's initiation fees and dues while otherwise maintaining a nonmember status. *See Union Starch and Refining Co.*, 87 NLRB 779, 781 (1949), *enf'd*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951) ("an employee who tenders to a union holding a valid union-shop contract an amount equal to the initiation fees and accrued dues thereby brings himself within the protection from discharge contained in the provisos of Section 8(a)(3)"). In this sense, "'[m]embership' as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). And, by reason of NLRA §§ 7 & 8(b)(1)(A), an employee covered by a union security agreement who chooses to become a full union member has the right to resign that status at any time and assume a "financial core" status. *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

It is also to the point that *Communications Workers v. Beck*, 487 U.S. 735 (1988)—which addressed "whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment,"—holds that NLRA § 8(a)(3) "does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes." *Id.* at 745. That being so, in the end, an objecting "financial core" employee's union security obligation is further "whittled down" to paying a percentage of union dues equal to the percentage of the union's total expenditures that are chargeable. *See Ellis v. Railway Clerks*, 466 U.S. 435 (1984).[3]

[3] There are still other limitations on a union security agreement's scope of application in addition to those discussed above in text.

For example, individuals with religious convictions against financially supporting a labor union are free of all obligation to pay dues or fees under a union security clause and may be required to make

As the court of appeals put it, the upshot of these rulings is that "the concept of 'membership' in CBAs has become a term of art." Pet. App. 7a.

D. Ms. Marquez's Claim.

The ultimate point of Ms. Marquez's claim is that the entire panoply of NLRA § 8(a)(3) union security agreement rules must be clearly and fully set out in each union security clause and cannot be incorporated by reference through a standard-form "membership" union security clause. Ms. Marquez argues that the use of "membership" as a "term of art" in this way is misleading, because membership in the colloquial sense cannot be required as a condition of employment, and clauses that use this legal shorthand "require[] employees to consult extraneous sources to discover their true rights and obligations." Pet. Br. 8.

Ms. Marquez's position in this regard is far reaching and unequivocal—a union that negotiates a standard-form "membership" union security clause "breaches the duty of fair representation, no matter whether the union enforces it as written." Pet. Br. 15. And, so that there can be no mistake, Ms. Marquez adds that "[n]otice of employees' true rights [under the clause] from extraneous sources or separate notices is insufficient," no matter how clear and effective the notice may be. Pet. Br. 14.

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contributions to a charity in lieu of the dues payments. 29 U.S.C. § 159.

In addition, the NLRB has held that individuals who have been expelled or otherwise excluded from membership in the union for reasons other than failure to pay dues are also free of all obligation under a union security clause to pay dues or fees. *See Communications Workers of America, Local 1104 v. NLRB*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

And, no employee can be required to pay an initiation fee that is "excessive or discriminatory" in the context of "the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected." 29 U.S.C. § 158(b)(5).

Ms. Marquez is equally clear about the legal consequences of the rule of law she advocates. Her claim is, of course, stated as a duty of fair representation claim and sounds in terms of a union dereliction in negotiating a union security agreement that has the capacity to mislead covered employees into becoming full union members, and not in terms of any substantive shortcoming in the agreement. But Ms. Marquez does not argue for an order requiring the agreement to be clarified or to be supplemented by a clarifying notice. Nor does she seek a remedy directed to covered employees who have been misled by the agreement into full union membership or even to employees who have arguably been so misled. Instead, it is Ms. Marquez's position that her claim leads to an order declaring "invalid the contract provision," Pet. Br. 30, and rendering the provision a nullity of no force or effect for any purpose with regard to any covered employee.[4]

To understand the precise scope of Ms. Marquez's fair representation claim it is important to be quite clear about what she is *not* claiming.

- First, while the gravamen of her complaint is that the SAG union security clause does not properly inform covered employees of their rights and obligations, Ms. Marquez does *not* allege that she ever saw the collective bargaining agreement containing the clause, much less that she ever read that clause. Nor does she allege that anyone made any reference to the wording of the clause at any time during the period in question. Indeed, Ms. Marquez does not even allege that prospective employees of Lakeside Productions, such as herself, receive copies of either the

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[4] Ms. Marquez's position on this score is a matter of brute necessity. As we have noted—and we develop further below—there is no evidence in this record that Ms. Marquez read the SAG union security clause much less that she was misled as to her union membership obligations by its wording; to the contrary the evidence is that Ms. Marquez was well advised in this regard and that she was not misled in any way.

SAG 1992 Memorandum of Agreement for Independent Motion Picture and Television Producers signed by Lakeside—which did not itself set out the union security clause—or of the SAG Codified Basic Agreement—incorporated by reference in the Memorandum of Agreement—which did contain the clause. *See* Jt. App. 28-32 & 38-42.

• Second, Ms. Marquez does not rest her attack on the SAG union security clause on any claim that she was, in fact inadequately informed on her rights and obligations concerning union membership. SAG's representative, who was involved in this matter, testified, without contradiction, that "it is well-known in the industry that a performer does not have to be a member of SAG to work on a project governed by a SAG contract." Jt. App. 49. And, confirming that statement, Ms. Marquez's agent—who was representing her in dealing with Lakeside Productions in connection with the events that precipitated this case—testified that she (the agent) was "quite familiar" with the legal rule that a "financial core member is required to pay only for the collective bargaining agreement" and that she advises her clients that assuming this status is "very beneficial" because "you can do both union and nonunion work." Jt. App. 33. *See also id.* at 36. Moreover, the court of appeals, recognizing that "unions have a duty to inform workers of the 'core' payment option," remanded this case for a determination of whether SAG had fulfilled that duty by informing Ms. Marquez of her rights in that regard. Pet. App. 16a.

• Third, while she seeks to invalidate the SAG union security clause, Ms. Marquez makes no claim that the substance of the clause is in any way contrary to the substance of the governing NLRA public law or that SAG in enforcing the clause has required anything of covered employees—such as full membership in the union or the payment of full union dues or fees by objecting "financial core" employees—that is contrary to the governing NLRA law. The uncontradicted evidence here establishes both that "it is not necessary that a performer become a 'member' of SAG in order to work under a SAG agreement," and that SAG "sends notices to all performers who . . . decline membership" informing them that they "have the right . . . to object to paying that portion of SAG dues which is allocable to non-representational activities." Jt. App. 49, 51, 52. *See also* Pet. App. 4a n.1.

Ms. Marquez's modest proposal, then, is that it is "irrational, disciminatory, or bad faith" *per se* for a union to negotiate a "membership" union security agreement that tracks the statutory language permitting such agreements, and that, by reason of that *per se* fair representation breach, the SAG union security clause here—and, of course, the standard-form "membership" union security clauses in the overwhelming majority of the collective bargaining agreements in this country—are "invalid" for all purposes.

E. Congress' Express Permission to Negotiate "Membership" Union Security Agreements.

Ms. Marquez's submission is belied by the statute itself. The 1947 Congress expressly provided for the negotiation of standard-form "membership" union security agreements and did so in full contemplation of the fact that NLRA § 8(a)(3) and its provisos make "membership" a labor law "term of art."

Nothing is better settled than that the "courts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). And, as we have just noted, "the [first] proviso to § 8(a)(3) . . . *expressly permit*[*s*] agreements conditioning employment upon *membership* in a labor union." *Schermerhorn*, 373 U.S. at 751 (emphasis added). As we have also seen, it is Ms. Marquez's claim that, by reason of the duty of fair representation, the "membership" union security agreement permitted by § 8(a)(3) are invalid.

Thus, what Ms. Marquez wants here is to make a fair representation *wrong* out of what the NLRA declares to be the statutory *right* of "an employer . . . [and] a labor organization [that] is the representative of the employees as provided in section 9(a) of the Act." NLRA § 8(a)(3). But on the most basic principles of statutory construction, the duty of fair representation—which is, after all, derived from the NLRA—cannot be used to override the plain language of the statute. And, that is particularly clear in this instance, since Congress went to great care to assure the legality of "membership" union security clauses.

In amending the Wagner Act to put § 8(a)(3) in its present form, the 1947 Congress "devoted the most mature deliberation . . . [to] the problem posed by compulsory union membership." S. Rep. No. 105, 80th Cong., 1st Sess., 5 (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act of 1947* 411 (1948) ("LMRA Leg. Hist."). Recognizing that this was "[a] controversial issue," S. Rep. No. 105 at 6, Congress "reach[ed] what it consider[ed] a solution of the problem which does justice to both points of view," *id. See Machinists Local v. Labor Board*, 362 U.S. 411, 418 n.7 (1960).

An integral part of this carefully balanced legislative "solution" is the express, unequivocal permission—*provided in the interest of promoting industrial stability and of facilitating the collective bargaining process*—for employers and unions to "enter into agreements requiring all the employees in a given bargaining unit to become members." S. Rep. No. 105 at 7. That permission, moreover, was vouchsafed as part of an overall legislative "solution" that placed limits on what the parties to such "membership" union security agreements could require—*in enforcing the agreements*—of covered employees in the way of membership obligations as a condition of employment. The proposition that a union violates its fair representation duty by negotiating an agreement within the express permission Congress wrote into the Act and tracking the statutory language, including the "term of art," in which Congress wrote that permission, thus flies in the face of the statute.

(1) The language of NLRA § 8(a)(3) as enacted was taken from the Senate Committee bill. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947), 1 LMRA Leg. Hist. at 545. And, the Senate Report explaining that amendment drew a sharp distinction between a "closed shop" and a "union shop." S. Rep. No. 105 at 6. It was the view of the Senate Labor Committee that "the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated." *Id.* By contrast, union shop "agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired" do not create such barriers to free employment and were permitted. *Id.* at 7. Reflecting these views, the Senate Report explained that § 8(a)(3) "abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop. . . ." *Id.* at 3.

In his "comprehensive statement" introducing the Senate bill, 2 LMRA Leg. Hist. at 1009, Senator Taft drew the same distinction between the "closed shop," which would be forbidden, and the "union shop," which would be permitted. *Id.* In "a closed shop . . . the employer binds himself not to employ anyone unless he is a member of the union at that time," while in a "union shop . . . an employer may employ anyone whom he chooses to employ, but after 30 days such employee has to join the union or else the employer can no longer employ him." *Id.*

In this opening speech, Senator Taft explained why he opposed outlawing the union shop:

> [T]he union shop has been in force in many industries for many years, and to upset it today probably would destroy relationships of long standing and

> probably would bring on more strikes than it would cure. [2 LMRA Leg. Hist. at 1010.]

Senator Taft made the same point in opposing Senator Ball's proposal to forbid union shop agreements:

> We considered the arguments [for abolishing the union shop] very carefully in the committee and I myself came to the conclusion that since there had been for such a long time so many union shops in the United States, since in many trades it was entirely customary and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union-shop contract. [2 LMRA Leg. Hist. at 1420.]

Thus, the Senate Labor Committee—and then the Senate and the Congress—decided on a course that "*will permit the continuation of existing relationships, and will not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will meet the abuses which exist.*" *Id.* (emphasis added).

(2) In addition to the closed-shop/union-shop issues dealt with in what became the first proviso to NLRA § 8(a)(3), the "abuses" of union security agreements that concerned the Senate Labor Committee involved "the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons." S. Rep. No. 105 at 6.[5]

To meet such abuses, the Senate bill contained "three additional safeguards," beyond those stated in the first proviso, "in order to safeguard the rights of employees *after such a* [*union shop*] *contract has been entered into.*"

[5] A frequently cited example was that of "a union member [who] was subpoenaed to appear in court, [and] [b]ecause he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job. . . ." *Id.* at 6-7.

S. Rep. No. 105 at 7 (emphasis added). The "three additional safeguards" identified in the Senate Report were:

> (1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fees or dues' (3) if a worker is denied membership or expelled from the union because he exercises the right conferred on him by the act to work for the change of a bargaining representative at an appropriate time, he cannot be discharged. [*Id.*]

The first two of these safeguards are expressly incorporated into the second proviso to § 8(a)(3), and the third is implicit in that proviso.

It is, thus, "the section's *second* proviso [that] mandates that . . . union membership is 'whittled down to its financial core.'" *Gilbert v. NLRB*, 56 F.3d 1438, 1441 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996) (emphasis added). *See NLRB v. General Motors*, 373 U.S. at 742. And, that mandate applies only "*after* such a [union shop] contract has been entered into . . . ." S. Rep. No. 105 at 7 (emphasis added).

Indeed, the second proviso's limitations on the enforcement of union security agreements were drafted in such a way as to minimize employer interference with the internal affairs of labor organizations. In this regard, the Senate Report explained:

> The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union. [S. Rep. No. 105 at 20.]

This purpose is reflected in the different restrictions imposed on employers and unions with respect to the dismissal of employees pursuant to the terms of a union

security agreement. Employers are forbidden to "discriminat[e] against an employee for nonmembership in a labor organization" where the employer has *"reasonable grounds for believing* that such membership was not available to the employee on the same terms and conditions generally applicable to other members" or was "denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining members." NLRA § 8(a)(3) (emphasis added). By contrast, unions are forbidden "*to cause or attempt to cause an employer . . . to discriminate* against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required. . . ." NLRA § 8(b)(2) (emphasis added).

(3) Read together and according to their plain meaning, then, § 8(a)(3)'s two provisos stand for the proposition that "an employer and a union may contract to require as a condition of employment that unit employees maintain 'membership' in the union, provided that membership is available to all and that it requires nothing more than 'tender[ing] the periodic dues and the initiation fees uniformly required.' 29 U.S.C. § 158(a)(3)." *Finerty v. NLRB*, 113 F.3d 1288, 1290 (D.C. Cir.), *cert. denied*, 118 S. Ct. 558 (1997).

The decision to proceed in this way—*to specify a lawful contract clause using a term of art and to place limits on its enforcement without requiring that those limits be spelled out in the clause*—represents not mere inadvertence but a careful policy judgment. As Senator Taft explained, in so framing § 8(a)(3), Congress' intent was to create a regime that "will permit the continuation of existing relationships, and will not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will

meet the abuses which exist." 2 LMRA Leg. Hist. at 1420.

F. The Status of Union Security Agreements as Lawful and Enforceable Contracts.

Not surprisingly then, as Senator Taft expected, and as we have noted, the unequivocal permission in NLRA § 8(a)(3)'s first proviso to negotiate standard-form "membership" union security agreements has resulted in their being by far the most common form of union security agreement. And, in an equally unsurprising development, it has been recognized from the start that these "membership" union security agreements are consistent with the requirements of the governing NLRA public law.

(1) As this Court noted in *Local 147, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), "Words in any legal document are ambiguous, but the body of law which grows up in an area through decision helps to dispel this ambiguity." *Id.* at 104 n.11, quoting Wellington, "Labor and the Federal System," 26 U. of Chi. L. Rev. 542, 557 (1959). For just this reason, "[c]ontracts are presumed to be written in contemplation of the existing applicable law," and, therefore, "the legal framework that existed at the time of a contract's execution must bear on its construction." *Florida East Coast Railway Co. v. CSX Transportation, Inc.*, 42 F.3d 1125, 1129 (7th Cir. 1994). This is a corollary of the more general rule that contracts should be "interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage." *Restatement (Second) of Contracts* § 220(1) (1981). *See also* 3 *Corbin on Contracts* § 545 (1960).

A fair summary of "the body of law which [has] grow[n] up in [the § 8(a)(3)] area," *Lucas Flour*, 369 U.S. at 104 n.11, is, as the court of appeals noted, that

"the concept of 'membership' in CBAs has become a term of art." Pet. App. 7a. That was plainly Congress' understanding in drafting § 8(a)(3), which, in its first proviso, permits unions and employers to negotiate "membership" union security clauses, and, in its second proviso, makes "membership" a term of art by limiting the scope of the clause's enforcement to the discharge of employees who fail to tender to the union its uniformly required periodic dues and initiation fees. And, that is the lesson of the NLRB and court decisions that interpret § 8(a)(3) and its provisos in a manner that gives a particular labor law content to the term "membership" in that statutory provision.

Thus, reading the term "member" in the SAG union security clause according to its legally prescribed meaning and common usage in the union security context, the clause "lends itself to a logically acceptable construction that renders [it] legal and enforceable." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). And, of course, this Court has squarely held that a union security agreement that is capable of such a lawful construction is to be so read and "cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." *NLRB v. News Syndicate Co.*, 365 U.S. 695, 700 (1961).

(2) Against that background, this Court, in elaborating on the meaning of the term "membership" in the provisos to NLRA § 8(a)(3) and on the limits the law places on the administration and enforcement of standard-form "membership" union security clauses, has gone out of its way to affirm the validity of such clauses.

In *Radio Officers v. NLRB*, 347 U.S. 17 (1954), the Court held that, while "the proviso to § 8(a)(3) . . . authorizes employers to *enter into* certain union security contracts," the statute "prevent[s] the *utilization* of union security agreements for any purpose other than to compel payment of union dues and fees." *Id.* at 40-41 (emphasis added). *Radio Officers* thus ratified the understanding of § 8(a)(3) reached by the NLRB in *Union Starch and Refining Co.*, 87 NLRB at 781-786. And, the lesson of *Union Starch* is that, "even where 'membership' is specifically required in a *valid* union-security contract, the union in particular situations cannot enforce the actual membership but can obtain at most the periodic dues and initiation fees." *General Motors Corp.*, 133 NLRB 451, 458 (1961), *aff'd*, 373 U.S. 734 (1963) (emphasis added).[6] As *Radio Officers* states, "membership" union security agreements are among the "certain union security contracts" that "the proviso to § 8(a)(3) . . . authorizes employers [and unions] to enter into." 347 U.S. at 40.

Communications Workers v. Beck, *supra*, on which Ms. Marquez relies heavily, is to the same effect as *Radio Officers* with regard to the legality of standard-form union security agreements. The *Beck* opinion begins from the premise that NLRA § 8(a)(3) "*permits* an employer and

[6] The legality of union shop agreements is underscored by this Court's opinion in *NLRB v. General Motors Corp.*, *supra*, which considered "whether the agency shop is an unfair labor practice under § 8(a)(3) of the Act or else is exempted from the prohibitions of that section by the [first] proviso thereto." 373 U.S. at 735. An agency shop "places the option of membership in the employee while still requiring the same monetary support as does the union shop," *id.* at 744, and "rel[ying] upon the express words of the proviso which allow employment to be conditioned upon 'membership,'" the employer argued that "since the union's proposal [of an agency shop] does not require actual membership but demands only initiation fees and monthly dues, it is not saved by the proviso," *id.* at 741. Starting from the premise that "[i]t is permissible to condition employment upon membership," *id.* at 742, the Court added that it could "find nothing in the legislative history of the Act indicating that Congress intended the amended proviso to § 8(a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements permissible under state law," *id.* at 741. To the contrary, the Court found that "[t]here is much to be said for the Board's view that, if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act *the union shop*, then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the union." *Id.* at 741 (emphasis added).

an exclusive representative to enter into an [agency shop] agreement" of the sort involved in that case and addresses only "whether this provision *also permits* a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment. . . ." 487 U.S. at 738 (emphasis added). The holding in *Beck* that § 8(a)(3) "does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes" is based on the "controlling" precedent of *Machinists v. Street*, 367 U.S. 740 (1961). 487 U.S. at 745. And, *Street* emphatically states that "the union-shop agreement itself is not unlawful." 367 U.S. at 771. Consistent with *Street*, the *Beck* opinion repeatedly states that "§ 8(a)(3) *permits* an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employement. . ." 487 U.S. at 745 (emphasis added; footnote omitted). *See also id.* at 749 ("§ 8(a)(3) allows employers to enter into agreements requiring all the employees in a given bargaining unit to become members").

Indeed, in *Machinists v. Street*, the Court—while agreeing with the lower court that once the plaintiffs "have . . . made known to their respective unions their objection to the use of their money for the support of political causes . . ., the respective unions were without power to use payments thereafter tendered by them for such political causes"—held that "*an injunction restraining enforcement of the union-shop agreement is . . . plainly not a remedy appropriate to the violation of the Act's restriction on expenditures.*" 367 U.S. at 771 (emphasis added).[7] *Railway Clerks v. Allen*, 373 U.S. 113 (1963),

[7] In this regard, the Court explained:

> [T]he union-shop agreement itself is not unlawful. *Railway Employes' Dept. v. Hanson*, [351 U.S. 225 (1953)]. . . . [The objecting fee payers'] grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds. If their money were used for purposes contemplated by § 2, Eleventh, the [objectors] would have no grievance at all. We think that an injunction restraining enforcement of the union-shop agreement is therefore plainly not a remedy appropriate to the violation of the Act's restriction on expenditures. . . . Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry . . ., and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations. [367 U.S. at 771-772.]

decided two years after *Street*, is to the same effect. *See id.* at 122 ("no decree would be proper which appeared likely to infringe the union's right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining"). And, by the time of *Ellis v. Railway Clerks*, the law was so clear on this score that the Court simply noted that the plaintiffs "do not contest the legality of the union shop as such, *nor could they*." 466 U.S. at 439 (emphasis added).

G. Ms. Marquez's Claim Here and the General Theory of the Duty of Fair Representation.

The foregoing demonstrates that Ms. Marquez's duty of fair representation theory runs directly counter to Congress' express permission in NLRA § 8(a)(3) to negotiate "membership" union security agreements. But we would be remiss if we did not add that her claim fails also because it has no base in the general theory of the duty of fair representation.

Under the duty of fair representation defined by this Court's decisions, "[a]ny substantive examination of a union's performance" in negotiations is "highly deferential"—"the final product of the bargaining process may

constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S., at 338, that it is wholly 'irrational' or 'arbitrary.' " *O'Neill*, 499 U.S. at 78. In this regard, all the following is highly relevant and beyond reasonable dispute:

• NLRA § 8(a)(3)'s first proviso, at the very least, contemplates the negotiation of "membership" union security agreements. And, that proviso does so in the interest of "permit[ting] the continuation of existing relationships [embodied in such agreements] and [of] not violently tear[ing] apart a great many long-existing relationships." 2 LMRA Leg. Hist. at 1420.

• The term "membership" in § 8(a)(3)'s first proviso was understood by Congress, and has been understood by the NLRB and the courts, as a labor law "term of art" whose meaning incorporates the limitations on required membership as a condition of employment stated in § 8(a)(3)'s second proviso and in the Board and court cases construing that statutory provision. And, under the normal principles of contract interpretation the term "membership" as used in a union security clause is read *in pari materia* with that term in § 8(a)(3).

• The office of a standard-form "membership" union security agreement, like that of contract clauses generally, is to establish an enforceable contract rule (or set of rules) binding on the parties and consistent with public law. Precisely because it is contemplated by the statute and is phrased in a "term of art" read to incorporate the applicable public law rules, a standard-form "membership" union security clause is well-suited to that office.

• The "member of the Union in good standing" language in SAG's union security clause follows the "model union-security clause" prescribed by the NLRB as "in conformity with the requirements of

the Act." *Keystone Coat*, 121 NLRB at 885. *See Local 74, Service Employees International Union (Parkside Lodge of Connecticut, Inc.)*, 323 NLRB No. 39 (March 21, 1997), slip op. 2 n.9, *pet. for rev. dism'd as moot sub nom., Orce v. NLRB*, No. 97-4038 (2d Cir. Dec. 9, 1997) ("there is no warrant for finding the 'members-in-good-standing' language of [a] union-security clause unlawful on its face").[8]

• By reason of their predominance, their acceptance over time, their relative simplicity, and the settled understanding that they do incorporate the gov-

[8] It is worthy of emphasis that from 1947 through the negotiation of the SAG Codified Basic Agreement in 1989 and Lakeside's adoption of that agreement in 1994 the NLRA law was absolutely uniform on the proposition that "membership" union security agreements—including those phrased in terms of "members of the Union in good standing"—are "in conformity with the requirements of the Act." *Keystone Coat*, 121 NLRB at 885. Neither of the 1993-1994 cases cited by Ms. Marquez did anything to disturb that uniformity.

Far from overruling *Keystone* in this regard, as Ms. Marquez asserts, Pet. Br. 21 n.10, the NLRB's decision in *Electrical Workers, I.U.E. 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1993), specifically holds that "the clause, with its phrase 'members of the Union in good standing,' . . . is capable of a lawful construction." Moreover, this holding was affirmed in *I.U.E. v. NLRB*, 41 F.3d 1533, 1539 (D.C. Cir. 1994), in an opinion expressly *rejecting* the argument—repeated here—that this Court's decisions "compel the conclusion that union-security agreements requiring 'membership in the union in good standing' are unlawful on their face."

In *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), the court of appeals overturned an NLRB order approving settlement agreements—and dismissing a complaint alleging that the collective bargaining agreement in that case contained an "overly broad union security clause" that had been "unlawfully interpreted and applied" —the "clause was unlawfully interpreted and applied" and "an adequate remedy [for such unlawful interpretation and application] requires expunction of the offering clause." *Id.* at 1005. Whether right or wrong on what constitutes an "adequate remedy" in such a case, *Bloom* has no application to the situation here, where the union security clause has *not* been "unlawfully interpreted and applied."

> erning public law, the standard-form "membership" union security provision provides an effective medium for expressing the parties' agreement to include in their collective bargaining agreement the most complete union security system consistent with law. In that way, the permission to negotiate such provisions facilitates collective bargaining and furthers industrial stability.

All that being so, it is self-evident that this "final product of the bargaining process" *cannot* "be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.' " *O'Neill*, 499 U.S. at 78 (citation omitted).

Indeed, Ms. Marquez's view—that unions have a duty to frame agreements in transparent language that reveals the covered employees' rights and duties in encyclopedic detail and not in terms of art that can only be fully understood by the employees through reference to external sources—has nothing to recommend it. That view would shrink to the vanishing point the "wide range of reasonableness" allowed to unions in negotiating labor contracts and, by so doing, would undermine the "practice and procedure of collective bargaining" it is the overall policy of the Act to "encourag[e]." NLRA § 1.

This Court has recognized that, as a general matter

> The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and

> some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, ["Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999], at 1005. [*Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960).]

Perhaps the paradigm example of a "less specific standard" on a matter of the most fundamental importance to the employer, the union and the covered employees is the standard arbitration clause. *Teamsters Local v. Lucas Flour* concerned the effect of a grievance-arbitration provision on the union's—and the employees'—right to strike over an arbitrable matter. And, *Lucas Flour* holds that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." 369 U.S. at 105. In other words, the *Lucas Flour* Court read the standard collectively bargained arbitration clause—which contain no explicit reference to strikes—to entail a commitment by the union not to strike over arbitrable issues.

No uninformed third person, not versed in labor law, reading a standard arbitration clause would find a no-strike promise in the words of such an agreement. Indeed, Justice Black accused the *Lucas Flour* majority of having found "out of clear air . . . this additional unwritten promise by the union." 369 U.S. at 106-107. At the same time, no decision suggests that a union breaches its duty of fair representation by failing to have a full explanation of the no-strike obligation entailed in the arbitration clause spelled out in the agreement. Nor is there any decision standing for the proposition that arbitration clauses that do not spell out the implicit no-strike obligation are invalid and of no force or effect. Indeed, invalidating arbitration clauses for lack of transparency would have the paradoxical effects of negating a plain meeting of the minds on the arbitration of contract disputes and of

denying the employer the benefit of the *Lucas Flour* rule implying a no-strike commitment.

The deleterious effects for collective bargaining that would flow from *requiring* the union and employer to agree on a statement of the full effects of an arbitration clause should be obvious. The parties, as the Court has stated, do start from "contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960). In any given negotiation, one party or the other may well be loath to set out *in haec verba* an elaboration of the clause's effects out of concern for the impact on its interests—the union in being able to strike whenever that seemed called for, and the employer in being able to seek damages should a strike be called. There are, after all, a host of second-level issues that may never arise but are difficult to work through in detail, such as, the status of sympathy strikes, unfair labor practice strikes, or health and safety walk-outs. Positioning for advantage in hypothetical disputes can only make it exceedingly difficult to agree to any clause providing for the arbitration of contract disputes.

If anything, negotiation of the proper wording of a union security agreement that spells out all of the rights and obligations of covered employees would prove more contentious.

The proper administration of a union security agreement—in particular the obligation to reduce the amounts charged to objecting "financial core" employees—is a matter of fair representation, and thus is primarily, if not exclusively, the union's responsibility. *See Communications Workers v. Beck*, 487 U.S. at 743-744. There is no reason to suppose that employers would not make tactical use of the opportunity to bargain over a statement of the *union's* obligations by taking an extreme position in order to press for concessions on other contract terms or to hobble the union with restrictions going beyond what the law requires. *See North Bay Dev. Disabilities Services,*

Inc. v. NLRB, 905 F.2d 476, 479 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991) ("the practical effect of such enforced bargaining could well be to require a union to negotiate with an employer the amount that it will devote to representation of employees in the future . . ., which is surely an internal union matter of no proper concern to the employer").

The problem is compounded by the fact that what constitutes an adequate summary of the rights and obligations of employees covered by union security clauses is a highly contested matter. Nothing demonstrates this as well as the recent experience of the NLRB in *Group Health, Inc. (OPEIU Local 12)*, 325 NLRB No. 49 (Jan. 30, 1998), slip op. 1, *pet. for rev. pending, Bloom v. NLRB*, No. 97-1582 (8th Cir.). In *Group Health*, the employer and union respondents renegotiated their union security agreement in attempt to settle unfair labor practice charges against them by satisfying the demand that "a union-security clause requiring employees to become and remain 'members of the Union in good standing' as a condition of employment, [set out a] concurrent definition in the collective bargaining agreement," stated in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945. The question of whether the settlement agreements succeeded in their purpose of framing a concise and accurate statement of the legal rights and obligations created by the union security clause there elicited no fewer than four different opinions from the five members of NLRB. 325 NLRB No. 49, slip op. 1-4 (Fox & Liebman), 2 n.10 (Hurtgen), 4-7 (Gould), & 7-9 (Brame). Indeed, the District of Columbia Circuit had a similar division over whether a union notice properly described the rights and obligations of employees covered by union security agreements. *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995). *Compare id.* at 1378-80 (Henderson & Silberman, JJ.) *with id.* at 1382-84 (Tatel, J., dissenting).

If NLRB members and circuit court judges cannot agree among themselves about how to accurately and succinctly describe the rights and obligations of employees covered by union security agreements, introducing this contentious issue into collective bargaining for resolution by the contending employer and union parties—each with its opposing interests—can only serve to "violently tear apart a great many long-existing relationships and make trouble in the labor movement." 2 LMRA Leg. Hist. at 1420 (Sen. Taft). That, of course, is precisely what Congress meant to avoid by drafting NLRA § 8(a)(3) as it did.

H. The Union Duty to Inform Employees of Their Rights and Obligations Under a Union Security Agreement.

In the end, Ms. Marquez's argument depends not on legal analysis but on a subliminal image—the image of employees covered by a standard-form "membership" union security agreement being provided with a copy of the agreement, and nothing more, put in isolation, and then required to take the step of joining the union and becoming full union members and of this fatefull step being taken under a legal regime in which unions have no legal duty to provide the covered employees with further information on their rights and obligations regarding union membership.

This emotive image—like so many of its kind—distorts reality. Indeed, the record in this case is sufficient to dispel this false picture. Nothing Ms. Marquez said or did here—and nothing Lakeside or SAG said or did—turns on the fact that the underlying union security agreement is set out in a "membership" clause rather than an agency fee clause or a clause spelling out the rights and obligations incorporated in the term "membership" as an NLRA § 8(a)(3) "term of art." And, everything of record indicates that Ms. Marquez—directly or through

her booking agents—understood each and every one of the public law limitations on—and inherent in—a "membership" union security clause.

To be sure, most employees don't have booking agents. But, in the nature of things, an employee cannot join a union in isolation—an interaction with the union's officers or members is necessary. And, in the run of cases, that interaction takes place not after an isolated study of a union security agreement, but in response to a union initiative.

This reality is very much to the legal point here. Ms. Marquez's suggestion that recognizing the validity of standard-form "membership" union security clauses frees unions to misuse the clause to suggest to employees that they must be full union members rests on a truncated rendition of the applicable law.

The Act prevents just the misuse hypothesized by Ms. Marquez. Unions—in taking any initiative to sign up members, in responding to any employee initiative or inquiry, and in taking any action to enforce a union security clause—must accurately explain to the employee the meaning of the 'membership" requirement. Unions failing to meet that obligation commit an unfair labor practice. "The comprehensive authority vested in the union, as the exclusive agent of the employees" gives rise to a "duty requir[ing] that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure" under the union security clause. *NLRB v. Hotel Employees' Union, Local 568*, 320 F.2d 254, 258 (3d Cir. 1963). And, the employer's concomitant obligation is not to discharge an employee "when the employer has reasonable grounds to believe that the union has failed to fulfill its fiduciary obligation." *Conductron Corp.*, 183 NLRB 419, 428 (1970). *See NLRB v. Zoe Chemical Co.*, 406 F.2d 574, 583 (2d Cir. 1969).

As the NLRB has recently stated the governing rule, unions have a duty "to notify newly hired nonmember employees of their rights under *Beck* [to object, if a nonmember] and *General Motors* [to refrain from membership], at the time the union first seeks to obligate these newly hired nonmember employees to pay dues." *Paperworkers International Union (Weyerhauser Paper)*, 320 NLRB 349, 350 (1995), *rev'd on other grounds sub nom., Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945. *See also Abrams*, 59 F.3d at 1378-81 (recognizing such a duty on the part of the union); *Nielsen v. Int'l Ass'n of Machinists*, 94 F.3d 1107, 1115 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1426 (1997) (same).

In the same vein, the decision of the court of appeals below recognizes that "unions have a duty to inform workers of the 'core' payment option." Pet. App. 16a. And, although SAG presented evidence that it did comply with that duty, Jt. App. 48-52, the court of appeals remanded for further proceedings on that issue. Pet. App. 18a. At the same time, as the court below also recognized, the critical point for present purposes is, in the Seventh Circuit's words, that nothing in the law "indicates that information of this detail must appear in the union security clause itself." *Nielsen*, 94 F.3d at 1115.

The Act, as Congress wrote it, then, both furthers the collective bargaining process by permitting standard-form "membership" union shop clauses *and* protects the employee right to refrain from union activity by policing union (and employer) invocation and enforcement of the clause.

The foregoing brings us to—and demonstrates the error of reasoning in—the court of appeals decision on which Ms. Marquez relies mostly heavily—*Wegscheid v. Local Union 2911, UAW*, 117 F.3d 986 (7th Cir. 1997).[9] We begin by emphasizing that *Wegscheid* is the weakest of reeds for Ms. Marquez to hold on to. As *Wegscheid*

[9] The other court of appeals decision issued after the events here in question that Ms. Marquez invokes—*Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945—follows *Bloom v. NLRB*, *supra*, and is not in point here for the same reason that *Bloom* is not in point. See p. 29, n.8, *supra*. Like *Bloom*, *Buzenius* addresses the question of whether the NLRB "abused its discretion in fashioning [its] remedial order," after "finding that a party has committed an unfair labor practice" in administering a union security clause. 124 F.2d at 789-790. And, the first question presented here deals with an entirely distinct legal issue from the remedy issue presented in those cases—whether a standard-form "membership" union security agreement is valid on its face, without regard to whether the clause has been properly applied and enforced.

Buzenius, moreover, turns on a distinction between "membership *in good standing*" union security agreements and "membership" union security agreements that, as we have noted, p. 9, n.1, *supra*, Ms. Marquez purposefully eschews. *Buzenius* thus correctly recognizes that "the Act explicitly permits an employer to enter into a CBA that contains a union-security clause requiring employees to acquire and retain 'membership' in a union as a condition of employment." 124 F.3d at 790. *See also id.* at 791 ("§ 8(a)(3) of the Act explicitly allows union-security clauses that require union 'membership' as a condition of employment") & 793 ("Congress, through § 8(a)(3), has sanctioned union-security clauses requiring union 'membership' as a condition of employment"). And, *Buzenius*, while emphasizing that "union-security clauses are valid in general," *id.* at 791, holds that, in contrast, "a union-security clause requiring employees to become and remain 'members of the Union in good standing' as a condition of continued employment, without concurrent definition in the collective bargaining agreement" is not, *id.* at 788. *See also, id.* at 791 ("a union-security clause that requires 'membership in good standing,' without concurrent definition of that term"), *id.* at 792 ("a union-security clause requiring 'membership in good standing' without further explanation in the CBA"), & *id.* at 793 ("include 'membership in good standing' language, without further definition, in the CBA"). This holding is, for the reasons we have stated in the text, incorrect. And, in any event, given the way Ms. Marquez has framed her first question presented to this Court, this holding is of no aid to her here.

came to the court of appeals, the plaintiffs' claim was reduced to the same entirely "abstract" challenge to the " 'facial validity' of the union shop," *id.* at 990, that Ms. Marquez makes in this Court. And, in the end, the court of appeals *rejected* this "facial invalidity" claim and dismissed the case as moot. *Id.* at 991. Thus, Ms. Marquez can only press bits and pieces of *Wegscheid*'s reasoning into her service.

Wegscheid first recognizes that standard-form "membership" union security agreements are "a close and accurate paraphrase of the statute," and then dismisses the significance of this parallel on the ground that "the Supreme Court has glossed the statute to change its literal meaning, indeed virtually to invert it." 117 F.3d at 990. And, in the same vein, *Wegscheid* then goes on to opine that "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Id.*

On this basis, the *Wegscheid* court concluded that employees covered by a "membership" union security agreement can state a fair representation claim by alleging that "the union misled them about their right to substitute the agency fee for union membership and full dues by the language of the union-shop clause and by statements made in person by union officers." 117 F.3d at 990. And, on that view of the law, "the only issue" in the case was "the likely effect of the misleading language of the collective bargaining agreement on these plaintiffs." *Id.* Because the "plaintiffs [made] no argument that they themselves are being misled by it," their challenge to the language of the agreement was dismissed as moot. *Id.* Indeed, the court stated that employees who have received "emphatic assurances by the union . . . that they don't have to join the union or pay anything more than the [reduced] agency fee [should they object] . . . would have a hard time persuading anyone that the collective bargaining agreement should be changed in order to protect them." *Id.*

The burden of our showing thus far is that *Wegscheid* is wrong in its essential premises. Congress' unequivocal permission to negotiate standard-form "membership" union security agreements was given with full understanding that, by reason of other statutory provisions going to the enforcement of such agreements, "membership" is a labor law "term of art." The NLRB's leading 1949 decision in *Union Starch* and this Court's decisions from *Radio Officers* through *Beck* do *not* "invert" the *intended* statutory meaning of "membership," they effectuate it. And, the "realistic explanation" of why nearly every union security agreement is a standard-form "membership" agreement is that this formulation is the accepted convention for expressing the parties' meeting of the minds on including in their collective bargaining agreement the most complete form of union security permitted by law. This convention facilitates the negotiation of such agreements, whereas the lack of such a convention could only frustrate the already difficult task of setting out a comprehensive charter for the workplace.

So that we are not misunderstood, none of this is to say that unions can make a secondary use of a "membership" union security clause to mislead employees regarding the meaning of that agreement and its legal effects. To the contrary, as we have emphasized, the employees *do* have a right to "emphatic assurances by the union . . . that they don't have to join the union or pay anything more than the agency fee. . . ." 117 F.3d at 990. Where such assurances are given, no one is misled. And, where the assurance are not given, the law provides a remedy by requiring the union to provide the necessary assurance and to return the affected employees to the position they would have been in had they been adequately apprised of their rights. *See Rochester Manufacturing Co. (Teamster Local 614)*, 323 NLRB No. 36, slip op. 4 (March 12,

1997), *pet. for rev. pending sub nom. Cecil v. NLRB*, No. 97-5302 (6th Cir.) (ordering union to notify employees of their rights and to retroactively honor resignations from membership and nonmember objections by reimbursing the nonchargeable portion of the objectors' agency fees).

Beyond that, in its ultimate terms—as opposed to the mischaracterizations and misunderstandings of the NLRA and the developed case law expressed along the way—*Wegscheid* is fatal to Ms. Marquez's claim here. On the present state of the record, her claim based on the wording of the SAG "membership" union security clause and its effect on her is most certainly moot. Ms. Marquez cannot "with a straight face" claim that the wording of the clause confused her or misled her in any way or that "a change in the collective bargaining agreement" would be of any significance to her. 117 F.3d at 990. The record evidence is that Ms. Marquez never saw the clause and was never apprised of its wording. Here, even more than in *Wegscheid*, the attack on the wording of the clause is an effort to bring at least a blush of color to an otherwise colorless "union misrepresentation" duty of fair representation claim.

II. THE CLAIM THAT THE CONTRACT'S 30-DAY GRACE PERIOD HAS BEEN APPLIED IN A MANNER THAT VIOLATES NLRA § 8(a)(3) IS WITHIN THE PRIMARY JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

In addition to challenging the "member of the Union" provision in SAG's union security clause, Ms. Marquez challenged the "30 day grace period" provision in that clause as "a misapplication of the first proviso of NLRA § 8(a)(3)." Pet. App. 10a. The courts below—quite rightly—dismissed this "grace period" claim as "preempted by the NLRB's exclusive jurisdiction." *Id.* at 13a.

A. The first proviso to NLRA § 8(a)(3) authorizes "an employer . . . making an agreement with a labor organization . . . to require as a condition of employment membership therein," but only "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." 29 U.S.C. § 158(a)(3).

Subsection 2 B of the SAG Codified Basic Agreement contains the following 30-day grace period provision:

> The foregoing subsection A, requiring as a condition of employment membership in the Union, shall not apply until on or after the thirtieth day following the beginning of such employment or the effective date of this Agreement, whichever is the later; . . . . [Jt. App. 28.]

Ms. Marquez does *not* mount any challenge to this grace period provision, which closely tracks the language of § 8(a)(3).

What Ms. Marquez *does* challenge is the parties' elaboration on the foregoing set out in the next clause of Subsection 2 B of the agreement:

> [T]he Union and the Producers interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry. . . . [Jt. App. 28-29.]

The agreement goes on to explain the legal basis of the foregoing gloss on the basic grace period provision and its provisional status:

> The interpretation contained in the first sentence of subsection B. of this Section 2 has been approved by an advisory opinion of the General Counsel of the National Labor Relations Board. If such approval of such sentence is changed by a ruling of such General Counsel, then the new ruling of such general

> counsel shall prevail, until the same is overruled by the Board or a court of competent jurisdiction. If the Board or a court of competent jurisdiction shall change said ruling in a proceeding in which the Union is a party, then the new ruling or opinion shall prevail, until the same is reversed by a court of competent jurisdiction. [Jt. App. 31.]

Ms. Marquez claims that this elaboration of the 30-day grace period rule is contrary to, and hence is invalidated by, NLRA § 8(a)(3) on the theory that it "den[ies]" covered employees "the separate thirty-day grace period with each employment that is their statutory right." Pet. Br. 23. In the court below, she presented her grace period claim in the following syllogism. Her major premise was:

> "[Under the] first proviso to section 8(a)(3) . . . employees have a statutory, thirty-day grace period with every employer." [Appellant's Ninth Cir. Br. 42.]

Her minor premise was:

> "The 'Union Security' provision of the agreement between SAG and Lakeside required 'as a condition of employment [by Lakeside] membership in the Union . . . thirty (30) days after [the person's] first employment as a performer **in the motion picture industry**.' Thus, the agreement denied employees the separate thirty-day grace period with each employment that is their statutory right . . ." [Appellant's Ninth Cir. Br. 42 (emphasis in brief; citation to record omitted).]

And, the conclusion she drew from these premises was:

> "[T]he union's conduct [in negotiating and enforcing this clause] violated the duty [of fair representation] **because** section 8(a)(3) of the Act prohibited that conduct." [Appellant's Ninth Cir. Br. 44 (emphasis in brief).]

The federal courts have undoubted jurisdiction over duty of fair representation claims. At the same time, it is perfectly well settled that " '[w]hen an activity is arguably

subject to § 7 or § 8 of the [NLRA], . . . *the federal courts* must defer to the exclusive competence of the [Board].' " *Communications Workers v. Beck*, 487 U.S. at 742 (emphasis in original), quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). That being so, the lower courts were clearly correct in their ruling "that this claim is preempted by the NLRA because it is nothing other than an unfair labor practices claim, depending entirely on the question of the proper interpretation of § 8(a)(3)." Pet. App. 11a. As the court of appeals explained:

> [T]he challenge to SAG's interpretation of the 30-day grace period required by the NLRA does not raise the § 8(a)(3) claim as a collateral issue in an otherwise straightforward fair representation claim. Her claim rests squarely upon the proper interpretation of § 8(a)(3): if the CBA's 30-day term is proper under § 8(a)(3) then SAG wins; if not Marquez prevails. [*Id.* at 12a-13a]

Comparison of Ms. Marquez's "member of the Union" claim with her "grace period" claim highlights the correctness of the court of appeals' preemption analysis and holding.

An allegation that a union has misled employees about their obligations under a union security agreement is, substantively, a "claim that the union failed to represent [the employees'] interests fairly and without hostility," and is, in that sense, the kind of fair representation claim presented in *Beck*. 487 U.S. at 743. And, the fact that the Union here, like the union in *Beck*, "seek[s] to defend [it]-sel[f] on the ground that the statute authorizes precisely this type of agreement" does not divest the federal courts of jurisdiction. *Id.*

But, while the *Beck* Court held it had jurisdiction over the fair representation claim in that case, the Court dismissed a claim that "the union has contravened the express terms of § 8(a)(3)" as "fall[ing] squarely within the

primary jurisdiction of the Board." 487 U.S. at 742. And, the Court emphasized that plaintiffs "may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." *Id.* at 743. As we have seen, Ms. Marquez's grace period claim is that the second part of the grace period provision in SAG's agreement "contravenes[s] the express terms of § 8(a)(3)." *Id.* at 742. That claim, therefore, "falls squarely within the primary jurisdiction of the Board." *Id.* As the Third Circuit put it, in dismissing a lawsuit similarly alleging that a standard-form union security clause violated NLRA § 8(a)(3), this "claim turns *Beck* on its head" by "not invok[ing] Section (a)(3) as a defense," but "[r]ather, . . . attempt-[ing] to use it to attack the collective bargaining agreement." *Beverly Enterprises-Pennsylvania v. Dist. 1199C*, 90 F.3d 93, 95 (3rd Cir. 1996).[10]

The line of demarcation *Beck* drew follows the one laid out in *Motor Coach Employees v. Lockridge*, 403

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[10] *Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989), on which Ms. Marquez relies to argue that she may cast an NLRA § 8(a)(3) claim as a fair representation claim, Pet. Br. 24 & 28, is of no help to her. *Breininger* held that there was federal court jurisdiction over a fair representation claim that a union, "in its representation of [the plaintiff], has acted arbitrarily, discriminatorily, and/or without reason or cause . . . in making job referrals, . . . [that] favored a faction of members . . . who have been known to support . . . the present business manager. . . ." *Id.* at 72. That claim did *not* rest on an allegation that the discriminatory referrals violated the unfair labor practice provisions of the NLRA. To the contrary, the Court noted that, in ruling on this DFR claim, "[w]e need not decide the appropriate scope of §§ 8(b)(1)(A) and 8(b)(2) because we reject the proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice," and emphasized that "[t]he duty of fair representation is not intended to mirror the contours of § 8(b). . . ." *Id.* at 86. It would, of course, be impossible to rule on Ms. Marquez's "grace period" claim without "decid[ing] the appropriate scope of §§ 8[(a)(3)] and 8(b)(2)," for the reasons explained by the courts below.

U.S. 274 (1971). The *Lockridge* Court held that a breach of the duty of fair representation claim brought by an employee who has been discharged under a union security clause for dues delinquency is preempted under *Garmon*. 403 U.S. at 293. While acknowledging that *Garmon* preemption does not extend to a true claim of a breach of the duty—which "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives" —the Court warned that if the "congressional policies *Garmon* seeks to promote are not to be swallowed up, the very distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained." 403 U.S. at 301.

Ms. Marquez cannot escape the force of *Beck* and *Lockridge* through the device of claiming that it is "arbitrary" to adopt a 30 day grace rule that a complaining party *argues* is contrary to § 8(a)(3). The only way to test the proposition that a particular grace period rule is *in fact* contrary to § 8(a)(3)—and thus an NLRA unfair labor practice—is to present that unfair labor practice charge to the NLRB for determination. And, as the court below quite aptly noted, "the *Beck* court specifically warned federal courts not to be hoodwinked by a plaintiff's attempt to side-step the exclusive jurisdiction of the NLRB over unfair labor practices claims. . . ." Pet. App. 12a.

B. Precisely because Ms. Marquez's "grace period" claim "rests squarely upon the proper interpretation of § 8(a)(3)," Jt. App. 13a, the *only* precedent cited in support of the merits of her position are NLRB decisions. Pet. Br. 22-28. Indeed, it is on the basis of this NLRB precedent that Ms. Marquez contests the court of appeals' observation that this case presents a "factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry," Pet. App. 13a, by asserting, to the contrary, that "[i]t is

a simple question of statutory interpretation," Pet. Br. 27. The "simple" interpretation of the statute, on which Ms. Marquez's bases her "grace period" claim, is that because "the first proviso to NLRA section 8(a)(3) permits only compulsory unionism clauses in which '*an employer* . . . require[s] as a condition of employment membership . . . on or after the thirtieth day following the beginning of *such* employment' . . ., employees have a statutory, thirty-day grace period with every employment relationship." Pet. Br. 22 (emphasis in original). We digress to point out that this "simple" interpretation is not consistent with the reasoning of the NLRB case law.

The NLRB, for example, has indicated that employees are *not* entitled to a new "thirty day grace period with every employment relationship," Pet. Br. 22, where a multi-employer bargaining unit is involved. *Mayfair Coat & Suit Co.*, 140 NLRB 1333, 1334-35 (1963). *See also Asbestos Workers, Local No. 5 (Insulation Specialties Corp.)*, 191 NLRB 220 (1971) (construing § 8(f)(2)'s 7-day grace period applicable in the construction industry). And, *Theatrical Stage Employees Local 644*, 259 NLRB 1415 (1982)—on which Ms. Marquez places principal reliance for establishing the merits of her "grace period" claim, *see* Pet. Br. 23, 24 & 27—expressly recognizes that "the existence of a multiemployer bargaining unit . . . might, even in the absence of continuous employment, provide some theoretical basis for legality" for calculating the 30-day grace period from the first day of employment with any employer who has signed the union agreement. 259 NLRB at 1422.

Contrary to her position, then, *Mayfair Coat & Suit* indicates that requiring Ms. Marquez to begin paying dues immediately upon employment by Lakeside, so long as Lakeside was within a multiemployer unit, was entirely lawful, since "earlier . . . she worked more than 30 days on a movie that was covered by a SAG agreement." Pet. App. 2a.

The basic test the Board would apply to determine whether Lakeside has joined the multi-employer unit which originally negotiated the Memorandum of Agreement for Independent Motion Picture and Television Producers is "whether or not the employer has indicated an 'unequivocal intention' to be a part of the bargaining unit." *NLRB v. New York Typographical Union*, 632 F.2d 171, 183 (2d Cir. 1980). Moreover, the Board has indicated that where there is a "multiemployer agreement to which the various contractors have executed letters of assent to be bound," it may be appropriate to apply a single grace period to employment by any signatory employer, whether or not that particular employer has actually joined the multiemployer unit. *Millwright & Machinery Erectors Local No. 740 (Tallman Constructors)*, 238 NLRB 159, 161 n.5 (1978).[11] The "ground rules for multiemployer bargaining have not come into being overnight[,] [t]hey have evolved and are still evolving, as the Board [has] employ[ed] its expertise in the light of experience. . . ." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 413 (1982).

As the foregoing shows, the court of appeals was correct in recognizing that this case does not present the

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[11] The Board makes this suggestion in discussing *Interstate Electric Co.*, 227 NLRB 1996 (1977), which held that preference can be given in hiring hall referrals for persons with work experience under signatories to the contract, even if those signatories are not part of a multiemployer bargaining unit, but merely employers who sign on to a multi-employer agreement. In construing the phrase "based upon service with *such employer*" in NLRA § 8(f)(4), the Board reasoned "it is more consistent with the purposes of that section to interpret the word 'employer' as including any employer who, although not a member of the multiemployer association with which the union negotiated the collective-bargaining agreement, has agreed to be bound by such agreemnt while performing work in that union's area of geographical jurisdiction." *Id.* at 1998. Of course, the Board's construction of the phrase "such employer" in § 8(f) is directly contrary to Ms. Marquez's construction of the similar phrase "such employment" in § 8(a)(3). *See* Pet. Br. 22.

occasion to further develop this law with respect to "[t]he factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry," because that "is precisely the kind of question that . . . the NLRB was designed to address." Pet. App. 13a.

In any event, it would not advance Ms. Marquez's preemption argument one step to establish that the NLRB has definitively concluded that an interpretation of the thirty day grace period such as that applied by the parties' to SAG's agreement violates § 8(a)(3). The courts have no more jurisdiction over clear unfair labor practices than over debatable ones.[12] As this Court has emphasized:

> The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act. "Administration is more than a means of regulation; administration is regulation." [*Lockridge*, 403 U.S. at 287, quoting *Garmon*, 359 U.S. at 243.]

"A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491 (1953).

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[12] This is so, if for no other reason, because the Board can change its mind about the appropriate application of the Act in a given context. Even if *Theatrical Stage Employees* did provide the unequivocal support for her position that Ms. Marquez believes it does, the ruling on which she relies was made by an administrative law judge and affirmed by the Board without extended discussion. 259 NLRB at 1416. That being so, the Board might well completely reconsider the portion of that case relied upon by Ms. Marquez were it presented with the circumstances of the instant case. And, such reconsideration would be entitled to the same level of deference as the Board's initial pronouncement. *NLRB v. Curtin Matheson*, 494 U.S. 775, 787 (1990).

Simple or not, then, there is no getting around the fact that the "question of statutory interpretation," Pet. Br. 27, raised by Ms. Marquez's "grace period" claim is squarely within the primary jurisdiction of the NLRB. And, this question of statutory interpretation does *not* "emerge as [a] collateral issue[]," *Beck*, 487 U.S. at 743, with respect to the "grace period" claim. Rather, the unfair labor practice issue is essential to this claim—"if the CBA's 30-day term is proper under § 8(a)(3) then SAG wins; if not Marquez prevails." Pet. App. 13a.

C. To be sure, in an attempt to avoid Judge O'Scannlain's cogent preemption analysis, Ms. Marquez now seeks to recast her claim to be that "SAG's negotiation of [a] misleading 'employment in the industry' requirement breached the duty of fair representation." Pet. Br. 22 (bold face and capitalization omitted). That claim, like Ms. Marquez's "member of the Union" claim—and unlike the "grace period" claim presented to the courts below—is cast as a duty of fair representation claim cognizable in the federal courts.

But the word "misleading" does not appear once in the section of Ms. Marquez's Ninth Circuit brief addressed to the grace period issue. Appellant's Ninth Cir. Br. 42-47. To the contrary, in this regard, Ms. Marquez's complaint was that "SAG enforced the agreement according to its terms." *Id.* at 43. "[I]t is too late in the day for [Ms. Marquez] to present to the Court [her] newfound legal theory." *Electrical Workers v. Hechler*, 481 U.S. 851, 864 n.5 (1987).

There is, moreover, good reason that Ms. Marquez did not initially frame her "grace period" claim in terms of the agreement being misleading—such a claim is patently frivolous. There is nothing "misleading" about the 30-day grace period provision in the SAG Codified Basic Agreement. That agreement provides for a 30-day grace period in precisely the terms dictated by NLRA § 8(a)(3). And, in the provision Ms. Marquez complains of, the

contract elaborates on the grace period rule with regard to Ms. Marquez's exact situation. Jt. App. 28. Moreover, the contract states the legal basis for the parties' interpretation of the grace period provision and defines the kinds of NLRB rulings that would serve to suspend or negate that interpretation. *Id.* at 31. Indeed, Ms. Marquez's complaint is *not* that the agreement misinforms employees of the parties' true interpretation of the grace period provision but rather that their interpretation as accurately stated in the agreement is, in her view, contrary to NLRA § 8(a)(3).

The agreement's elaboration on the basic 30-day grace period stated both in the agreement and in NLRA § 8(a)(3) may—or may not—be in conformity with the governing law. That, as we have seen, is a question for the NLRB. But it is most definitely clear, plain, and, in present respects, complete, and it is in no way misleading.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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